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Zumbansen, Peer, "The Future of Legal Theory" (2010). *Comparative Research in Law & Political Economy. Research Paper No. 38/2010.*
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OSGOODE HALL LAW SCHOOL

Comparative Research in Law & Political Economy

RESEARCH PAPER SERIES

Research Paper No. 38/2010

The Future of Legal Theory

Peer Zumbansen

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Comparative Research in
Law & Political Economy



CLPE Research Paper 38/2010

Vol. 06 No. 9 (2010)

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The Future of Legal Theory

Abstract: This paper is part of a larger inquiry into “The Future of Law”, conducted by the Hague Institute for the Internationalisation of Law (www.hiil.org). The present paper addresses the prospects of development in the area of legal theory. It argues for a fundamental transformation of legal theory in the context of an increasingly interdisciplinary investigation into conceptualising legal argument and law’s role in regulating modern societies, inside and outside known parameters such as the state, normative hierarchy or ‘unity of law’. Instead, we must ask how and whether law at all can (or, should) reassert its place in a multi-vocal assessment of social order.

Keywords: Legal Theory, governance, economic governance, globalization, regulation.

Jel Classification: K 33

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The Future of Legal Theory^{*}

Peer Zumbansen⁺

I. OPENINGS

An inquiry into the ‘law of the future’ unavoidably encompasses a reflection on the vantage point and perspective from which this future state is depicted. This reflection shapes the space in which the imagination of law’s tomorrow occurs. As such, it is concerned with questions of definition (“*What is Law?*”) and of context (“*Which Law?*”). As will become apparent, approaching these questions as two distinct sets of inquiry will allow us to recognise particular dynamics of legal evolution in a host of particular, evolving fields on the one hand and to reflect on the context in which this evolution takes place on the other.

As was suggested in the invitation to the ‘Law of the Future’ project, a specific analysis of law’s likely development in a given area is to be given priority over a general or blanket reflection on the future of law as such. However, such a more general, birds-eye reflection is necessary in order to be able to recognise how legal fields do not simply ‘exist’. Instead, they evolve according to particular dynamics and in specific contexts. As every lawyer in a certain field is well aware of, the law today is by no means that of yesterday, and in many cases the law of yesterday was plagued by a fundamental inability to express – in legal terms – that which, say, a ‘new’ legal field or a new approach to legal thinking today have in fact begun to embrace as a matter of legal analysis. Already it is clear that the law of tomorrow will encompass both developments in existing fields (as expressed, for example, in the expansion or the reduction or even elimination of particular rules) and the emergence of entirely ‘new’ fields of law. Examples here in hindsight include the emergence of ‘environmental law’ or ‘internet law’.

II. DEFINITIONS

Assessing the law of the future, thus, first prompts us to define law. As a cultural product, law escapes any non-contextual, a-historical definition. Rather, a combination of definitional approaches illustrates the complexity of references to law. The following lists competing concepts of law, all of which claim to capture law’s nature and role.

^{*} This paper was written as a ‘think piece’ for the Hague Institute for the Institutionalisation of Law (www.hiil.org). I am grateful for helpful comments to Alexandra Kemmerer, Andreas Maurer and Ralf Michaels.

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1	Law as an institutionalised system of rule enforcement
2	Law as a means of stabilising expectations
3	Law as a means of oppression
4	Law as hope
5	Law as an empty parasite—without (proper) method, heart or soul ...?

The crux of any attempt at defining law lies in the embeddedness of the definition in a larger theory of society. But, this ‘society’ is not an object open for analysis from a disinterested or comfortably removed Archimedean point. Any attempt at describing, explaining, assessing society *is* part of that society. Law, legal analysis, legal argumentation altogether constitute society’s self-reflection and as such contribute to the formation of society. This becomes clear when we distinguish between *law* and *justice*. Another closely related distinction is that between *legality* and *legitimacy*. What is expressed with reference to such distinctions is a tension between existing rules, or principles on the one hand and the larger goals they are meant to serve as well as the foundations on which this legality rests on the other. None can exist without the other, in other words there can be no legal theory solely concerned with legality without there being the reference to the foundation or aspiration of the system in place. This means, at the same time, that this tension does not result from the gap between a law on the ground and a law in heaven, between vulgarity and divinity. The one can be the other, and much of the confusion legal comparatists experienced in their interpretations of ‘foreign’ legal cultures results from the difficulty of understanding a legal system ‘from within’ rather than through pre-conceived notions of legality/legitimacy, law/justice.

Against this background, the suggested five definitional approaches to law become clearer. The first two – respectively law as institutionalised rule-enforcement system and law as mode of stabilising expectations – depict the essence of law to lie in two distinct realms. The first demands a particular framework for something to be called ‘law’. It refers to a distinct institutionalisation of creating, implementing and interpreting law. Law is thus removed, in form, from other rules and behaviour-governing norms such as, say, religious beliefs, ritual rules or ‘social norms’. This definition carries with it an implicit substantive orientation as well: law’s origin in and its association with a particular system of rule-creation is due to law’s distinctiveness in contrast to other norms. Only that counts as law, which is associated with that system.

It is important to emphasise that this institutional framework need not be the 'state'. In fact, it can be any form of societal organisation of the mentioned processes of legal rule creation, implementation and interpretation. Again, this constituted a crucial discovery not only by legal comparatists in their attempt to make sense of dramatically 'different' systems of legal rule creation, but also by legal historians tracing the relatively young nexus between state and law.

The second definition eliminates all references to the form in which the creation, implementation and interpretation of legal rules take place. Through this elimination of the formal infrastructure the definition eliminates the orientation and anchoring points needed in the first definition to find law in the first place. It places law, its emergence and evolution, *in* society, in other words, in all areas of societal activity. The only requirement, of sorts, is to ask that it be stabilising expectations. Shocking as this may sound when contrasted to the richly structured landscape of the Rule of Law with all its historical origins, institutions and organisations, the second definition is in fact much more embedded than it would seem at first glance. If law's nature and role was to stabilise expectations, the question necessarily arises as to *whose* expectations and as to which mode through which this stabilisation occurs this definition is in fact referring to. We can here recognise a considerable overlap between the first and the second definition. As in the first, the second can very well encompass highly sophisticated institutional frameworks of rule creation, implementation etc. But, unlike the first, the second points to the potentially highly amorphous, at first sight unstructured, unruly, informal space in which such processes occur. Unlike the first definition, the second one points to the radicalisation of the need to question the yardsticks with which the existence of a legal system is being depicted, affirmed and analysed. And, unlike the first, this definition can take no refuge in the reference to known patterns of rule creation etc. It is thrown back onto itself in trying to recognise structures of legal rule making.

The second definition captures in crude form a *system theoretical* understanding of law. In contrast to a politically based concept of an infrastructure through which not only legality, but legitimacy is produced and administered, the system theoretical approach to defining law declares any such institutionalised form as contingent. It can and perhaps did exist, but need not exist; while its existence in a particular place at a particular time has prompted the label of 'law' to describe this constellation, its inexistence (in another place, another time) is an insufficient reason for denying that constellation the very label.

The problems inherent to the two definitions can easily be seen: while the first definition is likely to overburden the legitimacy promises of the infrastructure in question, the second one runs the risk of everything becoming 'law'. The third and the fourth definition address the anxiety surrounding the 'why' of law, its purpose and function.

Law as a means of oppression versus law as hope, promise, aspiration? Law's evolution suggests constantly recurring adaptation processes that respectively strengthen, rather than weaken both definitions. A 'political' theory of law has long stressed the need to open legal rules to changed circumstances, in order to make law recognise the otherwise blind spots in the identification of legal subjects such as the inherent violence of legal decisions. In short, political

law is a law of constant change. From this perspective, law is deeply embedded in a political theory of societal change: law occupies a distinct, but not autonomous place in the larger project of social change. Law has and obviously does in many cases serve as a weapon of hope and emancipation - but also the opposite is possible and frequently the case: with reference to existing laws, great deeds of injustice are committed, a tight grip of oppression over society maintained and law deprived of all its sense of political inconclusiveness, openness and critique.

III. FUTURES

Law as institution, process, oppression or emancipation – which definition is likely to capture the essence of law in the future? Each of the discussed four approaches to law appears to capture an important dimension of law, while also highlighting the limitations of reducing the whole of law to this particular aspect.

The elimination of a preconceived, ‘typical’ or ‘traditional’ institutional infrastructure to house the ‘machinery of justice’ that characterises the system theoretical definition of law points to the abyss between the ‘inside’ and the ‘outside’ of the law. On the inside, the routinised reference to legal/illegal allows the system and those working within it to sharpen the lenses through which problems are identified not only as pertaining to ‘law’, but as involving questions of specific, differentiated areas of law such as, say, contract, property, tort or criminal law. Over time, this routine gives ‘the law’ a most powerful grip on basically all areas of society. Lawyers proliferate relative to the hegemonic expansion of law into every corner of society.

Legal overkill? Overjuridification? ‘Kill all the lawyers’? To be sure, the flipside of this power of law and of lawyers is the nagging doubt about law’s self-fulfilling prophecy. Should all that is being subjected to law’s reach, be in fact subjected to it? In the future, we might in fact adapt our question and ask whether law will and is able to continue to exercise an authoritative grip on societal processes.

While definitions 1, 3 and 4 have rather ambiguous answers on offer, the system theoretical approach offers a more sobering and quite revealing perspective on the future of law. Without the reference to the Rule of Law, to parliaments, bureaucracies or courts to be in charge of making and applying the law, the definition of what does and does not count as law must emerge out of the myriad workings of society itself. Echoing the political theory’s attempt to ‘open’ law to societal change, the systems theoretical concept of law stresses the particular quality of the distinction between law and non-law, but rejects the claim inherent to the political theory of law to elevate ‘law’ in contrast to non-law as something inherently higher, more dignified or of higher value. In fact, the system theoretical approach to law underscores the importance of understanding the question of legitimacy as basically unresolved. In contrast to the political theory of law, the system theoretical concept of law does not conceive of a (contingently existing) legal institutional infrastructure as inherently legitimate and in some

cases in need of adaptation or improvement. Rather, it highlights the complexity of the distinction between law and non-law as the foundational paradox of the legal operation itself. From this perspective, however, it is clear that law and legal norms can potentially be found anywhere: the only defining mark seems to be the operational distinction between legal and illegal.

This approach opens fundamental gateways for an assessment of law's future. We are engaged in an assessment of the future of law, because we associate something distinctive with the concept of law, something which is surely tied back to understandings of order, control, enforcement, perhaps even legitimacy and coherence. But, at the same time, the contrast between the first two definitions suffices to illustrate the possible variety in defining law. As we saw, both definitions are complementary. The first can very well be a case of the second, while the second highlights the utter contingency and historical-spatial arbitrariness of the first. Looking beyond the tension between the first and the second definition, we catch a glimpse of the deeper motivations that drive our inquiry into the meaning and purpose of law: these are expressed in definitions three and four. It is here, that we face the sobering historical record of all references to law: law's very instrumentality is its distinct hallmark. In the name of *this* or *that* (meaning, understanding, ideal or ideology of) law, in the name of law *tout court*, deeds are done, which some condemn as terrorism, others celebrate as acts of emancipation, some are freed, others incarcerated, some are aided and protected, others neglected, some empowered, others silenced. Law can function to sustain just as it can help break down an existing order. Its availability for different purposes speaks to law's multidirectedness and to the contingencies of its use.

This ubiquitous involvement of law in society's woes and throes stands in stark contrast to assumptions of an elevated stance of law, of law's dignity and supremacy over societal quarrels, of law as being called upon to intervene in instances of petty competition, inequality, and exclusion. Yet, law's involvement in the creation and administration of these conditions reveals law's functionalist spirit: always ready, available to all who know how to serve themselves of it. This suggests that we need to ask whether all of the first four definitions can withstand the challenge of the fifth definition, which posits that law has no proper method, heart or soul of its own, but really adapts the whys and hows of the societal context it comes to operate in. Surely, this is possible only against the background of the first four definitions: in fact, the fifth definition is empty without the tension between the notion of parasite and the preceding approaches to law. In other words, it is the tension between the first four and the last definition that makes the last one at all comprehensible. The last one 'knows' of the first four, but points to the impossibility of settling on only just one of these: instead, it makes clear, how law emerges from the practice of 'addressing', 'capturing', and 'expressing' the contingencies and paradoxes that mark all references to law (and justice etc) in the first instance court room as much as in the newly crafted constitutional preamble. Therefore, while none of the first four suffices to capture the complexity of referencing 'law' on their own, the fifth one incorporates and ironises the first four definitions – but only to make a much bolder and even more radical claim. The contention expressed in the fifth definition is that law is but a particular way of translating or transforming societal occurrences into a particular form of communication that is

proper to law. The fifth definition, then, expresses the exposed nature of law to society – in all its forms and appearances. Law emerges as a particular way of speaking about society. It is parasitic in the sense that it takes on myriad contents to which it applies the legal/illegal distinction. But, it remains an empty parasite, as its nourishment is not followed by growth. Law operates and law proliferates, but law does not gain in proper content. It remains fundamentally open – that is why its resourcefulness is recognised by both the right and the left, the radical and the conservative.

Only from this perspective, the first four definitions make sense – law appears in highly institutionalised, but sometimes formal, sometimes informal settings; law can dominate, silence and suffocate, but law can also emancipate, empower and give voice to claims not (yet) recognised as expressions of rights. It is through the lens of the fifth definition that the preceding four definitions reveal the deeply political, sociological and cultural dimensions of law.

IV. CONTEXTS

This last insight is crucial for our understanding of law's evolution in the future. Here, context is crucial: the context in which references to law occur, the context in which law prevails, or law fails, the context in which law reigns or is extinguished. It is impossible, even meaningless to assess law as such, without taking the context in which this reference occurs, into view. This has become an issue long before the alleged death or exhaustion of the nation state under the impact of all-encompassing globalisation processes. Only in the context of state-oriented theories of law does the 'end of the state'-image make sense in light of the new challenges that border-crossing and de-territorialised societal activities create for state-institutionalised legal systems. However, one of the most important insights from legal sociology and legal pluralism already at the beginning of the twentieth century was the recognition of a vibrant tension between 'official' and 'inofficial' normative orders, only inadequately expressed through the distinction between 'law' and 'non-law'. The sociological phenomenon of legal pluralism radically challenged the exclusivist claim for law to be borne out of state-authority alone. The identification of numerous non-state originating normative orders paved the way for a host of critical inquiries into the structure of legal systems. Much of the Western welfare state's concern (and frustration) with the creation of adequate legal protection for different parts of society was fuelled and further challenged on the basis of legal pluralist descriptions of social complexity.

Thus, *context* was always decisive in providing the space in which references to law (and justice) were made. It follows from the functionalist nature of law that law is bound to follow societal differentiation processes into the farthest corner of a highly complex society. Periodisations of different forms of state and society [for example 'rule of law' and 'industrial society',

‘social’/‘welfare state’ and ‘post-industrial society’, ‘enabling state’ or ‘risk society’] can only appear as arbitrary, even parochial depictions of the context in which law’s evolution occurs. The oft-noted transformation of the (formal) rule of law into the (substantive) law of the social, ‘interventionist’ and welfare state during the larger part of the twentieth century emerges as but one possible depiction of what happened – and also only in some parts of the world. Alternatives, even within the state-obsessed analysis of law’s fate in the nation-state setting of the Western hemisphere, alternatives run wild, if one only cared to look.

The ideological competition of progressive (‘law & society’) and conservative (‘law & economics’) models of a more empirically based, anthropologically and sociologically grounded legal theory speaks volumes of the contingency of models with which we aim to capture ‘law in context’. Law’s infamous blind spots, its violence and its silencing effects are the flip-side of the self-assured tone of law as social engineering in a progressive spirit. In times of crisis such as the financial crisis since 2007/2008, the sensitive and fragile balance between law and non-law which marks the evolution of law within societal differentiation threatens to be crudely washed away in the name of a ‘need for more, better, or tighter regulation’, for more ‘controls of the market’, for more effective ‘intervention’ and accountability. Allegations of state’s weakness compete with calls for more powerful and ‘effective’ states, as if such references would still have any resonance in the ‘real world’.

The narrative of law’s formality, functionalism, welfare state progressivism and its neo-liberal high-jacking since the 1980s, represented by the enormous rise to fame of law & economics and ‘social norms’ and complemented by a general refutation of state intervention into markets, is fundamentally challenged by accounts from within and from outside the Western nation state. Inside, the progressive impetus of the rule of law / welfare state narrative is received with fundamental scepticism, while outside, especially legal anthropologists and law & development scholars have been emphasising the parochial mindset that distinguishes between allegedly ‘advanced’ legal cultures and so-called ‘primitive’, ‘authentic’ ones. Time and again, legal comparatists have stumbled upon the misleading results of their assessments of foreign legal cultures, which followed from their preconceived notions of legal formality and substantive values. Complementing this critical self-inspection of comparative law and legal transplants, scholars in the South – particularly in the area of human rights – have been pondering on the structural impact that Western law, money and politics have had on the shaping of legal and power relations elsewhere. This has recently been opening up an ambitious and far-reaching engagement between the North and South on the way in which models of the state, law and the economy have been imposed by the North onto the rest of the world.

Where does this leave legal theory today, and what does legal theory have in store for tomorrow? Law’s extreme functionalisation is a necessary and as such inevitable by-product of an increasingly differentiated, complex and pluralist society. Law’s breathless catch-up game to juridify yet-unchartered societal territory, be that in the area of technical development in biology or chemistry or in the highly charged and increasingly important areas of morality and religion, is unlikely to give way to a more relaxed form of adapting law to changing societal circumstances. Instead, law’s functionalist orientation is both its promise and its Achilles heel. It

is its promise in light of the responsive and reflexive mode with which modern law has been drilling its way into highly complex areas of societal activity. What has marked the history of responsive/reflexive law since its origin in the 1970s is the vulnerability of this theoretical and conceptual opening of law to the needs and pressures of society. This finds clear expression in the methodological parallels between the progressive and the conservative theories of legal reform as promulgated by critical legal studies and 'law & society' on the one hand and by 'law & economics' on the other. Both emphasise to make law sensitive to the self-regulating potential in different corners of society. But, while the progressive strand pursues this agenda from a critical theory perspective in the attempt to rescue the political promises of, say, the juridification hopes of the welfare state, the conservatives embrace the self-governing forces of the 'market' and of individual self-empowerment. While the former remain attached to a political theory of law and social theory, the latter operate with an openly a-historical conception of the market, for which references to 'law' function merely as denotations of the necessary, formal 'framework' for otherwise autonomous market action.

V. PROSPECTS

It is obvious how theories of self-governing markets, 'social norms' and law as formal institution as expressed highly influentially by New Institutional Economics appears comparably more able to embrace the transformation of state-based political and legal thinking in a globalised world. The challenges emerging from a globally integrated world of extreme functional differentiation seem a promising testing ground for related theories of 'limited statehood' and self-regulatory markets. By contrast, political theories of law are currently seeking new alliances with sociological and political thinking around theories of cosmopolitanism, global governance and world society. The challenge for these progressive approaches to legal thinking, above all, lies in the need to rethink the institutional framework of political and legal theory in a world where the conditions of state-based political action, operating through elections and rule enforcement subject to democratic accountability, are undergoing fundamental changes. The future of the law is, from this perspective, very much that of the state – but, without the state as we knew it. Legal theory will in the future have to be even more mindful of its often undisclosed assumptions regarding, for example, particular institutional safeguards but also value systems that have been taken for granted in the mere reference to law and its role in governing society. The law of the future does not yet exist, but its birth depends to no small degree on the confrontation with the blind spots and aberrations of law in the past. This retrospective inquiry into the evolution of law will inevitably occur as a result of law being challenged by alternative proposals of social ordering, above all economics and religion.

To reinstate 'law' to play a role in the context of a globalised world, it will not be enough to sniff at the supposedly crude definition of law as the 'formal' counterpart to the otherwise 'informal' institutions of market self-regulation. The task, moreover, will be to lay out the particular

qualities of legal thinking in making the distinction between formal and informal. For law, this distinction has never been a mere sociological one between, say, parliamentary statutes on the one hand and, say, codes of conduct on the other. Rather, for law, the task has always been to create a space in which a political deliberation can occur about why the distinction occurs in the first place between statute (associated with law, formality, bindingness) and code (non-law, informal and non-binding). While new institutional economics seems to treat this distinction both as a disclosed sociological fact and as less openly disclosed result of an efficiency test ('markets as better regulators'), legal theory cannot be satisfied with this distinction. Instead, legal theory shows how law can only mean to point to the space in which distinctions between law and non-law are made. Whether one is or is not law, is – this we have learned over time and by looking right and left – contingent and at best arbitrary. But, at the same time, it is crucial and determinative of the role played by law in a particular context at a given time– in particular where references to law carry in themselves implicit or explicit claims to legitimacy and justice. Perhaps, legal theory's future is to keep pointing to the embarrassment in which we find ourselves when we look for criteria that could help us to distinguish between law and non-law.